Boede Co. v. *Bancroft and Son,* 98 Fed. 115. One of the fundamental reasons for permitting discovery in chancery was economy of time in preparing for and trying issues of fact. To give production only at the trial under Sec. 724 would defeat this fundamental object of giving production. See *Lord Montague* v. *Dudman,* 2 Ves. Sen. 398; *Brereton* v. *Gamul,* 2 Atk. 240; *Earl of Glengall* v. *Fraser,* 2 Hare 99.

"Volenti Non Fit Injuria" as Applied to Persons Riding in Exposed Places on Street Railway Cars.

The cases relating to the rights of persons occupying exposed places on street railway cars, while generally placed on the ground of contributory negligence, are more properly to be referred to the doctrine of voluntary assumption of risk. Contributory negligence involves the idea of misconduct, a failure to measure up to the standard of care of the average man. Voluntary assumption of risk may exist, although the risk would be incurred by the man of average carefulness.[1] Thus, the average man would stand on the rear platform of a car, although in so doing he may well be held to take the risks of certain dangers that are necessarily incident to that position, such as injuries caused by the normal swaying of the car. Adopting therefore the principle of *"volenti non fit injuria"* in this class of cases we should expect in general to find that a plaintiff is not barred because of his exposed position on a car unless (1) he has voluntarily taken such position, and (2) the injury which he has suffered is one that is peculiarly incidental to that position.

The necessity of transportation has in general been held sufficient to render the taking of the exposed position not voluntary. Thus, it is universally held that a passenger may occupy the platform or runningboard (of an open car) when the inside of the car is crowded;[2] and in the latter case the company owes him a duty of protection from the negligence of their servants,

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[1] For a full discussion of the doctrine of voluntary assumption of risk, see article by Francis H. Bohlen, Esq., 20 Harvard Law Review, p. 14.

[2] For reference to Pennsylvania cases, see P. & L. Dig. of Decis. Col. 22515.

for example, from a collision with another car, or from collision with a wagon standing in the street which was seen by the motorman,[3] but not from collisions with wagons where there was no negligence on the part of the motorman.[4]

The urgency of transportation, however, is not sufficient to prevent the occupation being voluntary when the place is so dangerous that injury must almost necessarily result; thus, where a person standing on the bumper of a car was struck in a rear-end collision,[5] or where a person took his position outside the guard-rail of an open summer car and was struck by a crowd of persons occupying a similar position on a car going in the other direction.[6]

The cases that present greater difficulty and in which there is some divergence of authority are those where a passenger occupies the platform of a car when there is sitting or standing room inside. According to the current of authority such a person is not barred from recovery,[7] although the intimation is that if there were a rule of the company prohibiting persons riding on the platform, notice of which was brought home to the passenger, the result would be otherwise.[8] This result seems in harmony with the principles governing the doctrine of assumption of risk. It would seem that the doctrine should prevent recovery when the injury results from the mere normal swaying of the cars, or even from negligence of persons getting on and off the cars. The Pennsylvania cases, however, have developed a rule which is contrary to the general current of authority. It is held that to ride on the platform of an electric car is negligence *per se,* which bars recovery for an injury received through the negligence of the company.[9] Several reasons may be assigned for this conclusion. (1) The courts of this State have distinguished between the case of persons riding on the platform of a horse car and that of persons riding on the platform of an electric car;[10] this distinction seems

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[3] *Bumbear* v. *United Traction Co.,* 198 Pa. 198.

[4] See *infra,* report of the recent case.

[5] *Bard* v. *Pa. Traction Co.,* 176 Pa. 97. (There being no evidence that he was seen by the motorman of the following car.)

[6] *Harding* v. *Phila. Rapid Transit Co.,* 217 Pa. 69.

[7] *Dolan* v. *Ry.,* 87 N. Y. 63; *Upham* v. *Detroit Ry.,* 85 Mich. 12.

[8] *North Chicago Ry.* v. *Brown,* 179 Ill. 126.

[9] *Thayne* v. *Traction Co.,* 191 Pa. 251.

[10] See language of Chief Justice Mitchell in the last cited case, and *Ry.* v. *Boudron,* 92 Pa. 475.

anomalous. (2) It is an unconscious application of a tendency that exists in the Pennsylvania courts in negligence cases to lay down artificial standards of care,[11] and to select some physical fact as conclusively indicative of absence of care.[12] (3) It is submitted that the result reached by the courts of this State results in part from a misunderstanding of the doctrine of voluntary assumption in risk. The real question under the doctrine of voluntary assumption of risk is, what is the danger that is normally to be anticipated from the position taken up. Manifestly a man in standing on the back platform of a car does not take "upon himself the risk of his position from *any cause.*"[9]

Certainly, no court would hold that where a car fell through a bridge whose defective condition was due to the negligence of the trolley company, and all persons on board were overwhelmed in the common disaster, that the plaintiff could not recover because he was standing on the platform. So, in lesser degree, while a person in taking his position on the platform may be held to assume the risk of injuries due to the swaying and jolting of the car, and the crowding of passengers, he should not, it is submitted, be held to take the risk of a rear-end collision.

In the recent case of *Hyde* v. *Seattle Electric Co.* (93 Pac. 903) the plaintiff descended to the step of an open summer car when less than a block from home. A wagon which was proceeding parallel to the car suddenly swerved aside and injured the plaintiff. The decision in favor of the defendant seems in accord with the principles developed above, for conceding the plaintiff was rightfully on the runningboard of the car, there was no evidence of negligence on the part of the company. Thus, the case is distinguished from the case cited above when a wagon was standing in the street and where the collision could have been averted by care on the part of the motorman.[3]

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[11] *I. e.*, not the standard of the average man, but a standard imposed by the court.

[12] Cf. necessity of "stopping" in level crossing accidents; also that the stopping of a car is a prerequisite to recovery in case of an injury sustained by a person leaving a car. The reason for this tendency is to require evidence which is easy of ascertainment by witnesses.